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In The

Supreme Court of the United States

October Term 1965

No. ~~1135~~ 158

EASTERN AIR LINES, INC. and
NATIONAL AIRLINES INCORPORATED,

Petitioners,

—v.—

NORTHEAST AIRLINES, INC. and
THE CIVIL AERONAUTICS BOARD,

Respondents.

Motion for Leave to File

AMENDMENT AND SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Of Counsel
W. A. NELSON
National Airlines, Inc.
Miami, Florida 33159

ANDREW T. A. MACDONALD
CROSS, MURPHY & SMITH
729 Fifteenth Street, N. W.
Washington D. C. 20005

HAROLD L. RUSSELL
JAMES H. BRATTON, JR.
GAMBRELL, HARLAN, RUSSELL & MOYE
825 Citizens & Southern Nat'l Bank Bldg.
Atlanta, Georgia 30303

JOHN W. CROSS
729 Fifteenth Street, N. W.
Washington, D. C. 20005

E. SMYTHE GAMBRELL
825 Citizens & Southern Nat'l Bank Bldg.
Atlanta, Georgia 30303

May 25, 1965

IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 1185

EASTERN AIR LINES, INC. and
NATIONAL AIRLINES INCORPORATED,

Petitioners,

—v.—

NORTHEAST AIRLINES, INC. and
THE CIVIL AERONAUTICS BOARD,

Respondents.

AMENDMENT AND SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners Eastern Air Lines, Inc. and National Airlines Incorporated present this Amendment to their Petition for a Writ of Certiorari, and respectfully show:

1. On May 19, 1965 Petitioners filed with this Court their Petition in the above case, seeking review of an order of the First Circuit handed down on April 13, 1965 (Appendix 191a).[1] In so doing, the Petitioners relied on an order of the First Circuit entered on May 11, 1965 (Appendix 204a) which belatedly granted Petitioners leave to intervene.

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[1] References to an Appendix page followed by the suffix "a" are to the Appendix filed on May 19, 1965 with the original Petition. The Appendix to this Amendment is paginated consecutively to the Appendix filed on May 19, 1965, but page numbers are followed by the suffix "aa."

2. On May 19, 1965, the same day the Petition was filed, the First Circuit entered an opinion and order on a motion to stay the taking effect of the May 11, 1965 order (Appendix 210aa-215aa). The May 19, 1965 opinion and order, while granting a stay of about ten days, stated:

a. That the order granting leave to intervene had not become effective, and that therefore Petitioners lacked standing (presumably, under 28 U.S.C. §1254(1)) to seek a stay and/or to seek review of the First Circuit's orders; and

b. That the First Circuit had not intended to grant intervention for the purpose of seeking review of its April 13, 1965 order unless its May 11, 1965 order were also brought up for review by this Court.

3. Petitioners submit that the action of the First Circuit in granting leave to intervene for the purpose of seeking review and then withholding the effectiveness of that grant to a point in time when review may become meaningless, constitutes error. That error is closely akin to the error of granting intervention only when too late to make a presentation to the First Circuit itself—an issue raised before this Court in the Petition filed on May 19, 1965. But the action taken by the First Circuit on May 19, 1965, places the intervention issue on all fours with two cases in which this Court has recently granted certiorari. *UAW* v. *Fafnir Bearing Co.*, —— U.S. ——, 85 S.Ct. 1087 (1965) and *UAW* v. *Scofield*, —— U.S. ——, 85 S.Ct. 666 (1965).

4. Petitioners also submit that the apparent requirement of the First Circuit that review may be had only as to *both* the April 13, 1965 order and the May 11, 1965 order is erroneous. The fact of the matter is that Peti-

tioners have brought the May 11, 1965 order before this Court (204a). However, it was the April 13, 1965 order which denied effective intervention and which contained errors as to §7(d) of the Administrative Procedure Act. And the orders which followed (CAB Order E-22084, April 26, 1965, and First Circuit Orders of May 11, 1965 and May 19, 1965) are largely procedural orders which were directly compelled by and hinged upon the validity of the April 13, 1965 order.

5. Despite the foregoing, it might be argued that if the May 11 and May 19 orders go completely unchallenged, and if the First Circuit should relinquish jurisdiction and dismiss the petitions for review now before it, a reversal by this Court and remand to a Circuit which has abandoned its jurisdiction without challenge as to that abandonment would be meaningless. Accordingly, therefore, Petitioners request review also of the order of the First Circuit entered on May 11, 1965 (as amended by the order of May 19, 1965).

6. Petitioners believe also that it is of importance that the May 19, 1965 order be before the Court. For that order serves to underscore and to compound the errors of the April 13, 1965 order. Thus, it shows that the First Circuit not only believes that meaningful intervention can be denied in proceedings before it, but that intervention (when granted) can be engineered in such a way as may precipitate the loss of jurisdiction of this Court and the deprivation of the rights of vitally interested persons to such review. Additionally, it highlights the thoroughgoing misconception of the First Circuit as to the use of official notice in agency proceedings. Those matters are of recurrent and substantial importance and merit review and corrective action by this Court.

WHEREFORE, Petitioners respectfully request that this Court allow amendment and supplement of the Petition in No. 1185 so as to bring before the Court for review the Orders of the First Circuit as aforesaid.

Respectfully submitted,

JOHN W. CROSS
E. SMYTHE GAMBRELL
Attorneys for Petitioners

Of Counsel:

W. A. NELSON
National Airlines, Inc.
Miami, Florida 33159

ANDREW T. A. MACDONALD
CROSS, MURPHY & SMITH
729 Fifteenth Street, N. W.
Washington, D. C. 20005

HAROLD L. RUSSELL
JAMES H. BRATTON, JR.
GAMBRELL, HARLAN, RUSSELL & MOYE
825 Citizens & Southern Nat'l Bank Building
Atlanta, Georgia 30303

May 25, 1965.

SUPPLEMENT TO APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Order of Court, dated May 19, 1965

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

Nos. 6220, 6233, 6445, 6506.

NORTHEAST AIRLINES, INC.,

Petitioner,

—v.—

CIVIL AERONAUTICS BOARD,

Respondent;

No. 6507.

MASTER EXECUTIVE COUNCIL OF PILOTS OF NORTHEAST AIRLINES, INC.,

Petitioner,

—v.—

CIVIL AERONAUTICS BOARD,

Respondent;

No. 6517.

INTERNATIONAL ASSOCIATION OF MACHINISTS,

Petitioner,

—v.—

CIVIL AERONAUTICS BOARD,

Respondent.

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[1] Pagination follows that in the appendix to the May 19, 1965 Petition for Certiorari, "aa" is here substituted for "a" there.

Order of Court, dated May 19, 1965

Upon consideration of motions for stay and memoranda thereon,

It is ordered that the order of this Court of May 11, 1965, be, and the same hereby is, modified by substituting "June 2, 1965" for "May 21, 1965" therein, as the effective date thereof, in accordance with opinion of May 19, 1965.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk.

A true copy:

Attest: /s/ ROGER A. STINCHFIELD
Clerk.

[Cert. cc. C.A.B., and Messrs. Peterson, Ozment, Wait, Rooney and Hanify.]

Opinion of the Court, on Motions for Stay, dated May 19, 1965

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

Nos. 6220, 6233, 6445, 6506.

NORTHEAST AIRLINES, INC.,

Petitioner,

—v.—

CIVIL AERONAUTICS BOARD,

Respondent;

No. 6507.

MASTER EXECUTIVE COUNCIL OF PILOTS OF NORTHEAST AIRLINES, INC.,

Petitioner,

—v.—

CIVIL AERONAUTICS BOARD,

Respondent;

No. 6517.

INTERNATIONAL ASSOCIATION OF MACHINISTS,

Petitioner,

—v.—

CIVIL AERONAUTICS BOARD,

Respondent.

Before ALDRICH, *Chief Judge,* and GIGNOUX, *District Judge.*

Opinion of the Court, on Motions for Stay, dated May 19, 1965

ALDRICH, Chief Judge. In our opinion of May 11, 1965 accompanying our order of like date recited to become effective May 21, 1965, we stated that any request for a stay should be made to the Board, then to the Supreme Court or a justice thereof, and not to us. Nonetheless, National and Eastern, hereafter movants, now ask for a stay in order to perfect certain petitions for certiorari and until the petitions be disposed of, or, at the least, until June 2, 1965. Eastern adds that the petitions will be filed on May 19. Northeast responds to this request by saying *inter alia,* not without merit, that our order of May 11 permitting movants to intervene has not as of this date taken effect, and asking what is movants standing to file petitions while the order is being stayed.

While this query might be thought technical, it does raise squarely a matter of some substance. Implicit, if not explicit, in movants' request is the assertion that while they intend to file a petition for certiorari to our order of April 13, 1965, they do not intend to file to our order of May 11. In our view this would be quite inappropriate. It was precisely to prevent piecemeal attacks that we suspended all of our May 11 order for ten days, not just part of it. National and Eastern become intervenors when that order ceases to be stayed. The case will then be ripe for them, as intervenors, to seek review of our April 13 order and our May 11 order.

While, as we have said, the Board's order of April 26, to which we assented on May 11, may well have been as a result of our order of April 13, it was not dictated by it. Movants say that we should stay our May 11 order assenting to the Board's order of April 26 because it may make the order of April 13 moot if we do not. The shoe is on

the other foot. Movants point to our language in permitting them to intervene to the effect that we did not want to impede their asserting their rights. We did not mean by this that we wished to deprive our order of whatever might be its legitimate effect. If our May 11 order makes our April 13 order moot, we do not wish to grant a stay in order to change it.

Furthermore, we do not want to stay our May 11 order for the purpose of permitting review of our April 13 order if our May 11 order is not also to be brought before the Court. Surely it would be inappropriate if a situation might arise whereby orders prior to our May 11 order were cut out from under and our order of May 11 relinquishing jurisdiction were left intact.

However, there is another, equally serious, consideration. The effect of staying our May 11 order would be to prevent the Board for some months from reopening the hearings, even if, in the Board's opinion, delay is contrary to the public interest. With all due respect, although National describes our April 13 order as novel, we have no such thought. Movants appear to suggest that we are undermining the principle of judicial notice. Parenthetically, it is not entirely clear that what the Board "noticed" was strictly by way of judicial notice. But even assuming that it was, we in no way attacked the principle of judicial notice. We held, rather, that it was not due process to take notice ex parte without opportunity to reply or rebut. This is not a case of taking notice of some simple, inescapable fact like the calendar, but of evidence, by hypothesis incomplete, at least as to time, and in any event subject to explanation in terms of consequences.

Opinion of the Court, on Motions for Stay, dated May 19, 1965

It seems so clear to us that the Board's action of which we disapproved on April 13 was improper that we do not propose to suspend for a matter of months, against the will of the Board, its continued orderly procedure if, in its opinion the public interest warrants a new review of the whole case. At the same time, since movants apparently misunderstood the meaning or effect of our May 11 order, and since the Supreme Court or a justice thereof, may disagree with this opinion, or may wish more time to consider it, we extend our May 11 order to become effective June 2, 1965.